

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | CG Docket No. 02-278 |
| Junk Fax Prevention Act 2005 |) | |
| |) | CG Docket No. 05-338 |
| Rules and Regulations Implementing the |) | |
| Telephone Consumer Protection Act of 1991 |) | |

**ARCARE, INC.'S COMMENT ON THE PETITION OF CYNOSURE, INC.
REQUESTING A RETROACTIVE WAIVER**

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Commenter ARcare, Inc. (“Plaintiff”) is the plaintiff in a TCPA action pending against petitioner Cynosure, Inc. (“Cynosure”) in the United States District Court for the District of Massachusetts.¹ Plaintiff submits these comments on Cynosure’s amended petition, filed October 26, 2016, seeking a retroactive waiver of the regulation requiring an opt-out notice on fax advertisements sent “with the prior express permission of the recipients or their agents” or requesting the Commission issue a declaratory ruling in its favor.² The Consumer and Governmental Affairs Bureau (the “Bureau”) sought comments on Cynosure’s Petition on October 28, 2016.³

As argued below, the Commission should deny the Petition in its entirety. First, the Commission has no authority to “waive” a defendant’s statutory liability under 47 U.S.C. § 227(b)(3) for violations of the “regulations prescribed under” the TCPA. Second, the Petition is untimely, where Cynosure has not demonstrated that it made “every effort” to file by April 30, 2015, as required by the October 30, 2014 Order. Finally, there is no good cause to grant Cynosure a retroactive waiver.

PROCEDURAL HISTORY

On October 30, 2014, the Commission issued an order that rejected the challenges to the validity of the Commission’s ability to promulgate and enact the opt-out regulation, but granted retroactive “waivers” purporting to relieve 24

¹ See *ARcare, Inc. v. Cynosure, Inc.*, 16-cv-11547 (D. Mass.) (the “TCPA action”).

² Petition of Cynosure, Inc. for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 and 05-338 (filed October 26, 2016) (the “Petition”).

³ Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338 (Oct. 28, 2016).

petitioners of liability in private TCPA litigation.⁴ The Opt-Out Order allowed other “similarly situated” parties to request waivers, and invited comments on those requests.⁵ The Commission emphasized that “such parties should make every effort to file such requests prior to April 30, 2015,” and that the Commission “expect[s] these parties to make every effort to file such requests prior to April 30, 2015.”⁶

Since the October 30, 2014 Opt-Out Order, the Consumer and Governmental Affairs Bureau has granted over 120 retroactive waivers in subsequent orders.⁷ It has also denied requested waivers.⁸ Retroactive waivers were granted “to parties similarly-situated to the initial waiver recipients granted relief by the Commission due to uncertainty whether the opt-out notice requirement applies to faxes sent with recipient consent.”⁹ However, the Commission has emphasized that the waivers provide relief only to faxes sent through April 30, 2015, and “[a]ny non-

⁴ *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014), ¶¶ 19–20, 32 and n.70 (“Opt-Out Order”).

⁵ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Nov. 28, 2014) (“Public Notice”) (“With this Public Notice, we seek comment on the Petitions as described below. Specifically, the Petitioners seek retroactive waivers of the opt-out notice requirement for fax ads they sent where prior express invitation or permission had been obtained from the recipient”).

⁶ FCC Confirms Opt-Out Notice Requirements Applicable to All Fax Advertisements, 29 FCC Rcd. 13498, 13498 (Oct. 30, 2014).

⁷ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015) (“Aug. 28 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015) (“Dec. 9 Waiver Order”).

⁸ *E.g.*, *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, Order Adopted and Released Nov. 2, 2016 (denying certain waiver requests in-whole or in-part).

⁹ Aug. 28 Waiver Order, ¶ 1.

compliant faxes (*i.e.*, faxes that do not include the required opt-out information) sent after that date are subject to Commission enforcement and TCPA liability.”¹⁰

FACTUAL BACKGROUND

Few of the relevant facts are known to Plaintiff, since discovery has not yet commenced. On July 27, 2016, Plaintiff filed a Class Action Complaint in the United States District Court for the District of Massachusetts, challenging Cynosure’s practice of faxing unsolicited advertisements in violation of the TCPA.¹¹ The complaint alleges that Cynosure sent an unsolicited fax advertisement to Plaintiff advertising Cynosure’s May 18, 2016 seminar on building a patient base with aesthetic lasers.¹² Plaintiff alleges that Defendant did not have Plaintiff’s prior express invitation or permission to send advertisements to Plaintiff’s fax machine.¹³ Plaintiff further alleges that the fax does not contain an opt-out notice that complies with the requirements of the TCPA.¹⁴

Cynosure answered Plaintiff’s complaint on September 30, 2016.¹⁵ On that same day, Cynosure filed its petition with the Commission. However, on October 26, 2016, Cynosure withdrew its petition and filed an amended petition. Cynosure requests the Commission grant it a retroactive waiver of section 64.1200(a)(4)(iv)’s requirements or, in the alternative, issue a declaratory ruling to clarify that either

¹⁰ *Id.* at ¶ 11.

¹¹ Class Action Complaint, *ARcare, Inc. v. Cynosure, Inc.*, 16-cv-11547, Dkt. #1 (“Complaint”).

¹² *Id.* at ¶ 11; *see also* Exhibit A to the Complaint.

¹³ *Id.* at ¶ 14.

¹⁴ *Id.* at ¶ 15.

¹⁵ Answer and Affirmative Defenses to Class Action Complaint, *ARcare, Inc. v. Cynosure, Inc.*, 16-cv-11547, Dkt. #22 (“Answer”).

“(1) Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements; or, (2) Section 227(b) of the TCPA is not the legal basis of the Rule.”¹⁶

ARGUMENT

No good cause exists to grant Cynosure’s petition. First, the Commission has no authority to “waive” a defendant’s statutory liability under 47 U.S.C. § 227(b)(3) for violations of the “regulations prescribed under” the TCPA. Second, the Petition is untimely, where Cynosure has not demonstrated that it made “every effort” to file by April 30, 2015, as required by the October 30, 2014 Order. Third, the Petition does not establish that Cynosure is similarly situated to other petitioners granted waivers and was not confused. Finally, the declaratory relief Cynosure requests is not appropriate. Cynosure’s petition should be denied.

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.

Numerous commenters in these proceedings, including Plaintiff, have argued that the TCPA creates a private right of action to sue for “a violation of this subsection or the regulations prescribed under this subsection”¹⁷ and gives the Commission no power to “waive” that right. Plaintiffs incorporate those arguments by reference.¹⁸

¹⁶ Petition, p. 9.

¹⁷ 47 U.S.C. § 227(b)(3).

¹⁸ *See, e.g.*, TCPA Pls.’ Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338 at 20–23 (Feb. 14, 2014); TCPA Pls.’ Reply Comments at 3–6 (Feb. 21, 2014); TCPA Pls.’ Comments on Stericycle, Inc. Petition at 6–7 (July 11, 2014); TCPA Pls.’ Comments on American Caresource Petition at 1–3 (Aug. 8, 2014); TCPA Pls.’ Comments on Unique Vacations, Inc. Petition at 6–8 (Sept. 12, 2014); Beck Simmons LLC’s Comments on Francotyp-Postalia Petition at 2, n.6 (Nov. 18, 2014); Physicians Healthsource, Inc.’s Comments on Allscripts Petition at 2, n.6 (Nov. 18, 2014); TCPA Pls.’ Comments on Petitions by

In addition, Plaintiff reiterates that there is no “historical precedent” for the Commission to retroactively “waive” a party’s statutory liability in a private TCPA action, and this action represents “a gross departure from settled historical practice” in violation of the separation of powers,¹⁹ as well as a violation of Plaintiff’s due-process rights by attempting to retroactively “interpret” away a vested, statutory cause of action.²⁰

II. Cynosure offers no reason for its failure to file a petition by April 30, 2015.

In general, where a petitioner seeking relief from the Commission had “ample time” to comply with a deadline and “offers no reason for its failure to do so,” the Commission will deny the relief.²¹ Cynosure had ample time to file a petition by April 30, 2015, but does not offer any reason for its failure to do so. Cynosure does not, for example, claim that it tried to file by that date but was somehow forced to wait until September and October 2016. Cynosure admits that the Commission

Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. at 23–31 (Dec. 12, 2014); TCPA Pls.’ Comments on Petitions by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. at 19–22 (Jan. 13, 2015); Physicians Healthsource, Inc.’s Comments on A-S Medication Solutions LLC’s Petition at 9–13 (Feb. 13, 2015); Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen Petition at 7–11 (Mar. 13, 2015); TCPA Pls.’ Comments on Petitions by Boehringer Pharmaceuticals and Esaote North America at 10–14 (Apr. 10, 2015); TCPA Pls.’ Comments on Thirty-One Petitions Filed on or Before April 30, 2015 at 5–8 (May 22, 2015); TCPA Pls.’ Comments on Endo Pharms. Petition at 9–13 (June 12, 2015); TCPA Pls.’ Comments on Petitions by Athena Health, Inc. & Ohio Nat’l Mut., Inc. at 5–9 (Sept. 11, 2015); Wilder Chiropractic, Inc.’s Comments on Scrip Inc. Petition at 4–7 (Oct. 9, 2015); Shaun Fauley’s Comments on Petitions by Virbac Corp. and Petplan at 4–8 (Dec. 18, 2015); TCPA Pls.’ Comments on Petitions for Retroactive Waiver filed by C. Specialites, Inc. and Legal & General America, Inc., CG Docket Nos. 02-278, 05-338 at 3 (May 13, 2016).

¹⁹ *PHH Corp. v. Consumer Fin. Prot. Bureau*, --- F.3d ---, No. 15-1177, 2016 WL 5898801, at *3 (D.C. Cir. Oct. 11, 2016).

²⁰ *Id.* at *33–36.

²¹ *In re Atlanta Channel, Inc.*, 27 FCC Rcd. 14541, 14545–46, ¶ 9 (rel. Nov. 9, 2012) (denying request to waive filing deadline).

granted waivers “through April 30, 2015,” but provides no explanation why it could not comply for more than a year after the deadline.²² The Commission should deny the Petition on this basis alone.

Cynosure may argue it could not be expected to seek a waiver until after it was sued, but it should make no difference for deciding the timeliness of a waiver petition when or even *if* a petitioner has been sued. Other petitioners complied with the deadline without having been sued. For example, on April 28, 2015, Truckers B2B, LLC, filed a petition explaining it sought a waiver because it was “concerned that it could one day face significant liability” for opt-out-notice violations.²³ On April 29, 2015, Wells Fargo filed a petition explaining it sought a waiver “as a prophylactic measure.”²⁴ There is nothing that prevented Cynosure from doing the same. The Commission should deny the Petition as untimely to encourage compliance with its deadlines in the future, both specifically with respect to this Petitioner and generally with respect to practitioners before the Commission.

III. Cynosure is not “similarly situated” to the other petitioners granted waivers.

In its Opt-Out Order, the Commission found that “good cause” existed to grant the 24 waivers because an “inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided

²² Petition, p. 5.

²³ *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

²⁴ *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

prior express permission.”²⁵ The Commission also permitted “similarly situated parties” to seek similar waivers.²⁶

Cynosure asserts that it is similarly situated to the other petitioners granted waivers of the opt-out notice requirement because it too has been named as a defendant in a TCPA class action and is “facing the possibility of substantial costs or liability.”²⁷ Other than this bare assertion, Cynosure provides the Commission with no facts about its business practices, faxing activity, or how it obtains consumers’ faxing information or consent by which the Commission can assess whether Cynosure is substantially similar to other petitioners. The Commission has stated that it will assess waiver requests “on a case-by-case basis.”²⁸ This necessarily requires that petitioners provide the Commission with enough supporting information to make an assessment of substantial similarity. Because the petition is wholly devoid of facts or independent information, Cynosure cannot show that it is “similarly situated” to other petitioners who were granted waivers.

Moreover, the Commission made clear that “the risk of substantial liability in private rights of action is, by itself, [not] an inherently adequate ground for waiver”.²⁹ Without any support that Cynosure had the prior express permission to send recipients fax ads, the mere fact that Cynosure has been named as a defendant in a TCPA class action does not render it substantially similar to other petitioners

²⁵ Opt-Out Order, ¶24.

²⁶ *Id.*, ¶2.

²⁷ Petition, p. 2.

²⁸ Opt-Out Order, ¶ 30, n.102.

²⁹ Opt-Out Order, ¶ 28.

granted waivers from the requirements of §64.1200(a)(4)(iv). Unlike earlier petitioners, Cynosure does not limit its request for a retroactive waiver to faxes sent prior to April 30, 2015. The Commission should be wary of issuing waivers to parties who sent faxes many months after the Commission issued its original opt-out waiver orders and who belatedly seek retroactive waivers. Here, Cynosure sent Plaintiff an unsolicited advertisement by facsimile advertising a May 28, 2016 seminar and did so without Plaintiff's express consent and without a compliant opt-out notice.³⁰ There is no indication that Cynosure obtained consent from anyone else, either. The Commission should not grant any waiver to a petitioner who continued to violate the law so far after the rules were issued and clarified. Cynosure's petition should be denied.

No good cause exists to grant Cynosure's petition because Cynosure was not confused about whether faxes sent with prior express permission or consent required an opt-out notice, but rather about the language of such opt-out notice. The faxes Cynosure sent contain an opt-out notice, which reads, "You may request that Cynosure not send any future advertisements to this fax number. To make this request please call 877-281-6342 and follow the voice prompts using pin #8419."³¹ Cynosure argues that the purpose of the TCPA "would not be furthered by subjecting Petitioners to potentially massive liability for faxes that did not contain

³⁰ Complaint at ¶ 11 and Exhibit A thereto.

³¹ *Id.* at Exhibit A.

proper opt-out notices” and that granting the waiver “would serve the public interest”.³²

Cynosure has not established that good cause exists to grant it a waiver. First, the Commission has provided that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.”³³ Cynosure’s ignorance of the specific requirements for a compliant opt-out notice does not rise to the “good cause” elucidated by the Commission. Moreover, the Commission specifically denied requests for waiver of the requirement that an opt-out notice can “comply substantially” with §64.1200(a)(4)(iv).³⁴ Cynosure’s request for a retroactive waiver from liability under the TCPA for its faxes that contained an opt-out notice, but one that was not compliant with Section 64.1200(a)(4)(iii) and (iv) must be denied.

Moreover, the fax Plaintiff received, which Cynosure contends was solicited or sent with permission, contains an opt-out notice, indicating that Cynosure was aware that such a notice was required on all faxes, but the opt-out notice does not comply with the TCPA’s requirements, including the Commission’s regulations on the issue. The Commission has afforded some petitioners a presumption of confusion, but the Commission should consider the evidence of Cynosure’s opt-out notice.³⁵ Inclusion of a deficient opt-out notice indicates that (1) Cynosure was

³² Petition, pp. 5-6.

³³ Opt-Out Order, ¶26.

³⁴ *Id.* at ¶ 33.

³⁵ *Id.* at ¶¶ 24-26; Aug. 28 Waiver Order, ¶ 15.

ignorant of the *form* of the notice required, but not confused as to whether an opt-out notice was required at all, or (2) Cynosure was ignorant of the Commission's rules regarding junk faxes entirely, and merely included the opt-out notice as good business practice, or (3) Cynosure knew of the Commission's rules but chose, for Cynosure's own reasons, to include an opt-out notice that didn't comply.³⁶ Under any of the three scenarios, inclusion of a deficient opt-out notice rebuts the presumption of confusion necessary for the Commission to grant Cynosure a retroactive waiver.

The Petition casts serious doubt on the premise that Cynosure was *confused* about the opt-out rules, but instead indicates that Cynosure knew about the opt-out rules and the form of the notice but simply failed to follow them. The Petition should be denied.

IV. Even if the Commission is inclined to grant Cynosure a waiver, it should be expressly limited to faxes sent through April 30, 2015.

As noted above, the October 30 Order is explicit that the Commission's waivers provide relief only to faxes sent through April 30, 2015, and "[a]ny non-compliant faxes (*i.e.*, faxes that do not include the required opt-out information) sent after that date are subject to Commission enforcement and TCPA liability."³⁷ Plaintiff's fax was sent well after that date and it is anticipated that many of the other faxes Cynosure sent also were sent after April 30, 2015. Thus, even if the Commission is inclined to grant Cynosure's untimely request for a waiver, it should clarify that such waiver applies only to faxes sent on or before April 30, 2015.

³⁶ See Aug. 28 Waiver Order, ¶ 18.

³⁷ *Id.* at ¶ 11.

V. A Declaratory ruling is not appropriate here.

Cynosure, like many petitioners before it, requests the Commission issue a declaratory ruling “to clarify: (1) Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements; or, (2) Section 227(b) of the TCPA is not the legal basis of the Rule.”³⁸ The Commission has denied this request previously, and should do so again here.³⁹

The Commission has repeatedly refused to issue a declaratory ruling in accordance with the one Cynosure seeks:

[W]e uphold the Bureau’s prior conclusion that there was no controversy to terminate or uncertainty to remove regarding to the statutory basis of the rule. We also find that the Bureau’s action to otherwise dismiss the requests as improper collateral challenges time-barred by the Commission’s rules was justified insofar as the requests state or suggest that there was no Commission authority for that rule or that section 227 did not provide such authority. Even if any petitioners had identified a basis to issue a declaratory ruling regarding the statutory authority to adopt the rule requiring an opt-out notice on fax ads sent with the prior express permission of the recipient, however, we conclude that section 227(b) of the Act, which provides the Commission with authority to prescribe regulations to implement the TCPA’s prohibitions on junk faxes, is the statutory basis for that rule.⁴⁰

Cynosure’s Petition offers nothing new and its request for a declaratory ruling should be denied, as should its request for a retroactive waiver.

CONCLUSION

The Commission should deny Cynosure’s request for a retroactive waiver of the requirement that Cynosure must include a compliant opt-out notice on its fax

³⁸ Petition, p. 9.

³⁹ Opt-Out Order, ¶¶ 7, 14; Aug. 28 Waiver Order, ¶ 2; Dec. 9 Waiver Order, ¶ 11.

⁴⁰ *Id.* at ¶ 14.

advertisements, including those sent prior to April 30, 2015, and should deny Cynosure's request for a declaratory ruling, in the alternative.

Respectfully submitted,

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